

IN THE HIGH COURT OF TANZANIA
AT IRINGA

MISC. CRIMINAL APPLICATION NO. 29 OF 2013
(From the decision of the District Court of Njombe in
Misc. Criminal Application No. 2 of 2010
Original Criminal Case No. 1 of 2009
of Njombe Urban Primary Court)

JOSHUA NYATO APPLICANT
VERSUS
JULIUS SALINGWA RESPONDENT

15/8/2014 & 26/9/2014

R U L I N G

MADAM SHANGALI, J.

The applicant JOSHUA NYATO has filed this application based under Section 25 (1) (a) and (b) of the Magistrate Court Act, Cap. 11 seeking for extension of time to file his appeal out of time against the decision of the Njombe District Court dated 22/12/2010 and delivered on 29/12/2010 in favour of the present respondent JULIUS SALINGWA. The application has been supported by the affidavit deponed by applicant in person.

This matter has a long history. For the sake of clarity let me recapitulate albeit briefly the applicant's sojourn to this court. It started before Kidegembe Ward Tribunal where the respondent as a Chairman of the Kidegembe Secondary School Board sued the applicant for the offence of trespass and malicious damage to property.

The applicant was convicted and fined. Dissatisfied the applicant filed his appeal to the Njombe Primary Court. The Primary Court decided to call all witnesses and hear the case afresh as a Criminal Case No. 1 of 2009. Having heard the case, the Primary Court decided in favour of the respondent and imposed the same fine against the applicant. That was on 9/7/2009.

The applicant was not satisfied with that decision. He opted to appeal to the Njombe District Court but he discovered that he was time barred. He filed an application for leave to file his appeal out of time before Njombe District Court – that was Misc. Criminal Application No. 2 of 2010. On 29/12/2010 his application was rejected and struck out with costs for failure to disclose sufficient reasons for the delay.

The applicant was still dissatisfied. He preferred an appeal to this court to challenge that decision of the District Court. His appeal attempt namely PC Criminal Appeal No. 2

of 2011 was struck out on 12/7/2011 (*Hon. Kihio, J.*) for failure to file notice of intention to appeal within ten days after the date of the ruling (*whatever the notice meant*).

Undeterred the applicant filed another application before this court under Section 361 (2) of the Criminal Procedure Act, Cap. 20 seeking for extension of time to file his appeal out of time. That was Misc. Criminal Application No. 12 of 2011. On 10/10/2013 that application was struck out by this court for being filed under wrong provision of the law.

The applicant has come once again with this present application seeking for extension of time to file an appeal out of time against that decision/ruling of Njombe District Court.

The applicant appeared in person and unrepresented while the respondent was represented by Mr. Shimbo learned advocate. On the request of the parties, this court ordered the application to be argued by way of written submission.

The applicant's written submission was somehow incomprehensible but what I gathered from his submission is that the delay to file the appeal against that decision of Njombe District Court was caused by the fact that his first attempt to appeal which was lodged within time was struck out by the court on technical matters, to wit failure to cite the

correct law. He also contended that the delay was caused by the fact that he is a layman who in bonafide thought that a letter of application for copies of judgement and proceedings for the purpose of lodging an appeal is tantamount to the giving of notice of intension to appeal. He prayed the court to allow his application because the delay was not due to his negligence or inaction.

Mr. Shimbo, learned advocate submitted that the applicant's first appeal was struck out on 12/7/2011 and the first application for extension of time was struck out on 9/10/2013 because of the applicant's negligence and failure to cite the correct provisions of the law. He submitted that such conducts on the part of the applicant cannot be held to constitute sufficient reason for the extension of time because the applicant is responsible for his own unreasonable dids which caused the delay. He cited the case of **Laurian J. R. Rwebembera Vs. Nendiwe Investment Limited, Civil Application No. 62 of 2008 – CA** (*unreported*).

On the issue of the applicant being a layman coupled with ignorance, Mr. Shimbo submitted that ignorance of law does not constitute a sufficient reason to grant extension of time. He cited the case of **Chesco Muyinga Vs. Sietco, Misc. Civil Application No. 50 of 2005 HC – Dodoma** (*unreported*) where the court observed;

“the law on an application for leave to appeal to a higher court out of time is so unsympathetic to these late comers, for it says that even ignorance of the law is no sufficient cause.”

If all were well, the issue to be determined at this stage would have been whether the applicant has shown sufficient cause to warrant this court to grant him leave to appeal out of time. Unfortunately, that is not the position. When I was perusing the record of proceedings of this case I discovered a serious and fatal irregularity touching on the issue of jurisdiction.

The record of proceedings disclose that having find himself late to file his appeal against the decision of Njombe Urban Primary Court in Criminal Case No. 1 of 2009, the applicant filed Misc. Criminal Application No. 2 of 2010, before Njombe District Court, seeking for extension of time to file his appeal out of time. That application was rejected on 29/12/2010 for failure to disclose sufficient reason. Since that time the applicant has been fighting for a chance to impugn that decision of the Njombe District Court.

In my judicial scrutiny I have discovered and found out that the Misc. Criminal Application No. 2 of 2010 was filed under wrong provisions of the law. That application was filed

under Sections 93 and 95 of the Civil Procedure Code, Cap.33 and Section 14 of the Law of Limitation Act, 1971. These provisions of the law are totally and completely inapplicable to the criminal matters originating from Primary Court. Applications for extension of time on matters originating from Primary Courts are made under the provision of Section 20 of the Magistrate Court Act, Cap. 11.

The position of the law is clear that failure to cite the proper enabling provision of the law which would seize the court with jurisdiction to adjudicate the matter before it is fatal up to the hilt. Therefore having been wrongly moved the Njombe District Court had no jurisdiction to entertain and determine that application. In other words the application before Njombe District Court lacked legal support and therefore was incompetent and a nullity. See the case of **Sea Saigon Shipping Limited Vs. Mohamed Enterprises (T) Limited Civil Appeal No: 37/2005 - CAT Dar-es-Salaam (unreported)**.

Having said that, and in the exercise of this court's appellate jurisdiction as provided under Section 29 (e) of the Magistrate Court Act, Cap. 11, I hereby find that the Miscellaneous Criminal Application No. 2 of 2010 before Njombe District Court was filed under wrong provisions of the law and hereby declared the proceedings and decision thereof a nullity.

That means even the present application which originated from a nullity have no leg to support. It is equally incompetent and hereby struck out.

Each party to attend his costs.

M. S. SHANGALI

JUDGE

26/09/2014

Ruling delivered in the presence of applicant in person and Mr. Nyato Erick, learned advocate holding brief for Mr. Shimbo (Advocate) for the respondent.

M. S. SHANGALI

JUDGE

26/09/2014